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No. 80-201

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SILVER CREEK PACKING CO., a corporation,
Petitioner,

VS.

RAY MARSHALL, Secretary of Labor,
U. S. Department of Labor,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NISEI FARMERS LEAGUE AS AMICUS CURIAE

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TABLE OF CONTENTS

I

Page

Interests of the amicus curiae 1

II

Argument 5

A. In 1974 Congress rejected the "Title To Crop" test which the Ninth Circuit utilized in the Silver Creek case for determining whether or not a packing house is entitled to the Section 3(b)(3) exemption from registration. Whether the farmer or the packing shed operator holds title to the crop at the time of harvest is therefore not determinative of whether the packing shed operator is harvesting the crop solely for its own operation 5

1. The fact that the Section 3(b)(2) exemption lists both "Farmers" as well as "Packing Shed Operators" who hire agricultural workers solely for their own operations cannot be ignored 7

B. If this honorable court does not reject the Title To Crop test, the application of that test to the Section 3(b)(2) exemption will lead to absurd results for the members of the Nisei Farmers League 15

III

Conclusion 17

TABLE OF AUTHORITIES CITED

Case

Page

Usery v. Paramount Citrus Ass'n, Inc., 475 F. Supp. 700 (1979) 14

Regulations

29 C.F.R.:
Section 41.17 ..... 3, 8, 9, 10, 12, 13
Section 41.17(b) 10

Statutes

California Civil Code, section 2026 9
California Labor Code:
Section 1140.4(a) 8
Section 1140.4(b) 8
Farm Labor Contract Registration Act of 1963 (7 U.S.C. section 2041 et seq.):
Section 2 — (7 U.S.C. section 2041) 2, 7
Section 3(b) — (7 U.S.C. section 2042(b)) 5, 7, 8
Section 3(b)(2) — (7 U.S.C. section 2042(b)(2)) ..passim
Section 3(b)(3) — (7 U.S.C. section 2042(b)(3)) 5
Section 3(g) — (7 U.S.C. section 2042(g)) 5, 6
Section 4(c) — (7 U.S.C. section 2043(c)) 6
Section 9(b) — (7 U.S.C. section 2048(b)) 6
Internal Revenue Code of 1954:
Section 3121(g) — (26 U.S.C. section 3121(g)) 5, 7, 8
Fair Labor Standards Act of 1938:
Section 3(f) — (29 U.S.C. section 203(f)) 5, 7, 13
Labor Management Relations Act of 1947:
29 U.S.C. section 141 et seq. 8

Other Authorities

Senate Report No. 202; 1964 U.S. Code Cong. & Admin. News 3690-3706 7
Senate Report No. 93-1295, P. L. 93-518; 1974 U.S. Code Cong. & Admin. News, 6441-6451 ..... 7, 12, 13, 14

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BRIEF OF NISEI FARMERS LEAGUE AS AMICUS CURIAE

By motion for leave of this Court, filed simultaneously herewith, Nisei Farmers League, a California non-profit corporation, (hereinafter "Nisei Farmers League" or "NFL League") files this brief as amicus curiae.

I

INTERESTS OF THE AMICUS CURIAE

Silver Creek Packing Co. (hereinafter Silver Creek) is a for-profit corporate melon "packing shed operator" that employs agricultural (i.e., migrant) workers to harvest the melon crops of shareholder and non-shareholder farmers

with whom it has contracted to harvest, pack and sell. Silver Creek only harvests those melon crops that it has contracted to pack and sell. It exerts substantial control over the planting and care of those crops which it has contracted to pack and sell, and it completely controls the harvesting process itself. After harvest, Silver Creek's own agricultural employees haul the melons in Silver Creek's own vehicles to its packing shed where the melons are packed, sold, and shipped. Silver Creek supervises and controls the entire harvest, haul, packing, selling, and shipping operation. The farmer-clients exercise no control and have no right to control any of these operations.

On September 19, 1977, U. S. District Court Judge M. D. Crocker ruled that Silver Creek's hiring of harvest workers (who pick the melons grown by farmers who have contracted with Silver Creek to sell and market said melons) is "solely for [Silver Creek's] own operation" so that Silver Creek is entitled to the Section 3(b)(2) exemption from registration under the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), 7 U.S.C. § 2041, at § 2042(b)(2).

On March 25, 1980, the Ninth Circuit Court of Appeals reversed the District Court thereby requiring Silver Creek to register. The Ninth Circuit held that Silver Creek's utilization of its harvest workers upon the melon fields of its farmer-clients was not "solely for [Silver Creek's] own operation" so that it was not entitled to the Section 3(b)(2) exemption from registration. The Ninth Circuit held that while Silver Creek hires its own migrant workers for its own harvesting operations and benefits from the

harvest workers efforts, that said hiring is not "solely" for Silver Creek's operations because the farmers whose melons are picked also benefit from Silver Creek's hiring activities. The Ninth Circuit Court of Appeals supported its dual "benefit" test by stating said benefit test conformed with the Secretary of Labor's Regulation at 29 C.F.R. § 41.17 (hereinafter Regulation 41.17) interpreting Section 3(b)(2) of the FLCRA.[1] The Ninth Circuit Court of Appeals interpreted Regulation 41.17 to provide that title to the crop at the time of its harvest is determinative of the Section 3(b)(2) exemption from registration issue. That is, since title belonged to the farmer at the time Silver Creek's crews were harvesting the crop, not only Silver Creek but also the farmer derived a benefit from the workers' harvesting activities since the farmer was not indifferent about whether the crops were harvested.

The amicus curiae, Nisei Farmers League, has an interest in this case in that approximately thirty of the members of the Nisei Farmers League are packing shed operators whose operations and relationships with their client-farmers are substantially identical to the Silver Creek situation. Said League members may be required to register if the Ninth Circuit's "title to crop/dual benefit" interpretation of the "solely for its own operation" language of the 3(b)(2) exemption is allowed to stand.

Further, the amicus curiae, Nisei Farmers League, has an interest in this case because approximately 1,300 of its remaining members are farmers who have an identical or substantially similar harvesting relationship with their

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[1]Regulation 41.17 is quoted infra.

packing shed operators. Said farmer members of the Nisei Farmers League are concerned because many of their packing operators have chosen to cease harvesting their crops rather than register under the FLCRA. Those farmer members are now in a position of having to locate large numbers of harvesting workers for short periods of time which is almost an impossible task. Packing shed operators (prior to the Silver Creek decision) were better able to obtain harvesting workers because said packing shed operators, by moving harvesting crews from client-farmer to client-farmer, were able to promise their workers almost year-round employment.

Also, many of the Nisei Farmers League's farmer members are concerned that under the "title to crop/dual benefit" interpretation of the 3(b)(2) exemption (utilized in the Ninth Circuit's Silver Creek decision) any sale of the crop growing on the tree by a farmer which involves an obligation upon the farmer to harvest and deliver the previously sold crop to the buyer may place said farmer in a position of having to register under the FLCRA.

II

ARGUMENT

A. In 1974 Congress Rejected The "Title To Crop" Test Which The Ninth Circuit Utilized In The Silver Creek Case For Determining Whether Or Not A Packing House Is Entitled To The Section 3(b)(3) Exemption From Registration. Whether The Farmer Or The Packing Shed Operator Holds Title To The Crop At The Time Of Harvest Is Therefore Not Determinative Of Whether The Packing Shed Operator Is Harvesting The Crop Solely For Its Own Operation

In this case, the Secretary of Labor seeks to enjoin packing shed operator Silver Creek from violating the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), 7 U.S.C. § 2041 et seq. The sole issue in this case is whether Silver Creek is a "farm labor contractor" within the meaning of Section 3(b) of the FLCRA, 7 U.S.C. § 2042(b), and thus subject to the registration provisions of that Act; or whether Silver Creek is entitled to the Section 3(b)(2) exemption from registration. Section 3(b) and 3(b)(2) state, in pertinent part, as follows:

> "Section 3: As used in this Act—
>
> (b) The term "farm labor contractor" means any person, who for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers[2] (excluding members of

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[2]Section 3(g) provides that the term "migrant worker" means an individual whose primary employment is in agricultural, as defined in Section 3(f) of the Fair Labor Standards Act of 1938, 29 U.S.C. 203(f), or, who performs agricultural labor as defined in Section 3121(g) of the Internal Revenue Code of 1954, 26 U.S.C. 3121(g), on a seasonal or other temporary basis.

his immediate family) for agricultural employment. Such term shall not include—

> (2) any farmer, processor, canner, ginner, packing shed operator, or nurserymen who personally engages in any such activity for the purpose of supplying migrant workers solely for his own operation".

Silver Creek and the Department of Labor agree that Silver Creek is a "packing shed operator" within the meaning of Section 3(b)(2). The parties also agree that the harvest workers whom Silver Creek employs upon its client-farmers' property are "migrant workers" within the meaning of Section 3(b)(2).[3] The Ninth Circuit Court of Appeals itself recognized that Silver Creek, even though it is a corporation, can and does, "personally hire" agricultural laborers. The only issue raised by Petitioner Silver Creek, therefore, within its Petition For Writ of Certiorari (which it filed with this Honorable Supreme Court on August 14, 1980), is whether Silver Creek's hiring of harvesting workers is done "solely for [Silver Creek's] own operation", so as to be excluded under Section 3(b)(2) from the definition of a "farm labor contractor".[4]

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[3]Said harvesting workers are certainly agricultural workers within the meaning of Section 3(g) of the FLCRA.

[4]Note that the farmer-members of the Nisei Farmers League have a vested interest in the Silver Creek decision because Section 4(c) of the FLCRA provides that no farmer shall engage the services of any farm labor contractor to supply farm laborers unless he first determines that the farm labor contractor possesses a certificate from the Secretary of Labor. A farmer who hires a farm labor contractor who does not possess a certificate of registration from the Secretary of Labor is subject under Section 9(b) of the FLCRA to a civil monetary penalty of not more than $1,000.00 for each violation of the FLCRA.

The purpose of the Farm Labor Contractor Registration Act of 1963 (both before and after the 1974 amendments thereto), is to regulate "middlemen" who exploit both migrant workers and . . . "primary users of such labor—farmers, growers, and packing shed operators . . .". [See, Senate Report No. 93-1295, P. L. 93-518 which appears within 1974 *U.S. Code Cong. & Admin. News,* 6441-6451, at 6442. See also, Senate Report No. 202 reported at 1964 *U.S. Code Cong. & Admin. News* 3690-3706. Further see, Section 2 of the FLCRA, 7 U.S.C. § 2041.]

Therefore, the issue can be re-stated as whether Silver Creek's hiring of harvesting workers was done in its capacity of a middlemen between the workers and farmers, or for Silver Creek's own operations.

1. The Fact That The Section 3(b)(2) Exemption Lists Both "Farmers" As Well As "Packing Shed Operators" Who Hire Agricultural Workers Solely For Their Own Operations Cannot Be Ignored

Congress at Section 3(b)(2) listed both "farmers" as well as "packing shed operators" who may be exempt from registration under Section 3(b)(2) when they recruit, solicit, hire, furnish or transport agricultural workers for "agricultural employment"[5] for the purpose of supplying agricultural workers solely for his own operation.

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[5]Agricultural employment is defined under Section 3(b) of the Act as meaning employment in any service or activity included within the provisions of Section 3(f) of the Fair Labor Standards Act of 1938, 29 U.S.C. 203(f), or Section 3121(g) of the Internal

Packing shed operators employ two classes of workers. They employ industrial workers covered by the Labor Management Relations Act of 1947, 29 U.S.C. § 141 et seq., who work inside of the processing or packing plant. They also employ outside harvesting field workers who work picking and hauling the crops of their farmer-clients. Said harvesting workers are not covered by the Labor Management Relations Act of 1947. Instead, they are covered by the California Agricultural Labor Relations Act. [See, California Labor Code § 1140.4(b) and (a), and Labor Management Relations Act § 2(3).]

Therefore, Congress clearly intended the Section 3(b)(2) exclusion from registration to apply, under certain circumstances, to packing shed operators employment of agricultural harvesting and hauling workers for their own operation. However, the "title to crop/dual benefit" test promulgated by the Secretary of Labor in Regulation 41.17 and accepted by the Ninth Circuit Court of Appeals in the instant case, results in the conclusion that only a packing shed operator's indoor processing or packing employees are entitled to the 3(b)(2) exemption from registration. But that conclusion is absurd. That conclusion renders the Section 3(b)(2) exemption meaningless since inside processing and packing employees are industrial (not agricultural) employees who do not even fall within the general definition of the type of employees which can possibly make an employer a labor contractor under Section 3(b).

Revenue Code of 1954, 26 U.S.C. 3121(g) and the handling, planning, drawing, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

The Ninth Circuit Court of Appeals' interpretation of Congress' intent (when Congress established both a farmer 3(b)(2) exemption and a packing shed operator 3(b)(2) exemption) is in complete disregard of the realities of the operation of a packing shed business. Almost every packing shed operator in the California agricultural community is a "factor or commission merchant" (as defined under California Civil Code § 2026) who picks, hauls, packs, sells, and ships agricultural commodities grown and owned by its farmer-clients. *The real issue, therefore, for this Honorable Court to determine, is whether the packing shed operator's hiring of an agricultural employee in a particular case is done for harvesting that is part of the packing shed operator's own operation or for harvesting that is done by the farmer, using the packing shed operator as a middleman to supply agricultural workers.*

In so determining whether the hiring in a particular case is done for harvesting that is part of the packing shed operator's own operation, the Secretary of Labor relied on Regulation 41.17 which the Ninth Circuit Court of Appeals ruled requires a "title to crop/dual benefit" test. Said Regulation reads in relevant part as follows:

> (a) The Act was intended to regulate the practices of all persons functioning in the capacity of middlemen between the farmer, processor, etc., and the migrant workers. Thus, the exclusion applies only in those situations where the normal functions of the middlemen are performed by the farmer, processor, etc., solely for himself and should any of these persons perform in the role of middlemen, such as where the activities are in behalf of other employers, producers,

> processors, etc., in addition to himself, the exclusion would not apply. . . .
>
> (b) For example, [1] if a processor solicits, recruits, hires, furnishes, or transports migrant workers to be used in the harvesting of crops which he has in fact purchased through a contract with the farmer, and under whose contractual terms title to the crop is vested in the processor before the crop has been harvested, the exemption would apply, because the processor would be supplying migrant workers solely for his own operation. [2] Where the processor or any other person acts as a conduit through whom the migrant workers are made available to third parties, even though the crops on which the migrant workers are employed are the subject matter of a contract to purchase (as distinguished from a contract of sale) and will be used in the processing, canning, etc., the exception does not apply."

This Regulation is *not* authority demanding the utilization of the "title to crop/dual benefit" test whenever a Court considers the problem of whether the hiring in a particular case is done for harvesting that is part of the packing shed operator's own operation or for harvesting that is done by the grower, using the packing shed operator as a middleman to supply migrant workers.

Actually Regulation 41.17 adds no assistance to the Court's determination whatsoever. Let us consider the two examples, in reverse order, which are contained within paragraph (b) of Regulation 41.17 upon which the Secretary of Labor so heavily relies.

The second example merely states the problem of whether the processor is in fact acting as "a conduit through whom

the migrant workers are made available to third parties", and it notes that a processor may be a "conduit" even when the crops are the subject of a contract to purchase (although he could not be a conduit where the crops are the subject of a contract of sale giving the packing shed title to the crop prior to harvest). The second example does not in any way give this Court guidance as to when a packing shed operator should be considered a middleman/conduit versus when the packing shed operator's utilization of harvesting crews should be considered solely for his own operation.

The first example is superfluous and of no assistance to this Court's consideration of the problem. It is superfluous because if the packing shed operator had purchased the crops prior to harvest, then the packing shed operator would be a "farmer" engaged in hiring migrant workers for his own harvesting operations and clearly entitled to Section 3(b)(2) exclusion.

The Secretary of Labor would have this Honorable Court, as did the Ninth Circuit Court of Appeals, rule that a packing shed operator is only entitled to a Section 3(b)(2) exclusion when he owns title to the crop prior to harvesting said crop so that the farmer does not also receive a benefit by the packing shed operator's harvesting operation. But that "title to crop/dual benefit" test ignores the fact that Section 3(b)(2) creates an exemption for *both* packing shed operators and farmers. To use the "title to crop/dual benefit" test changes Section 3(b)(2) into only an exclusion for farmers and never an exclusion for a packing shed operator who is not operating as a farmer.

Congress must have in fact intended that packing shed operators would be entitled to a Section 3(b)(2) exclusion from registration (when said packing shed operators were functioning in capacities other than as farmers) since Congress utilized both the words "farmer" as well as "packing shed operator" when it listed the individuals who would be entitled to the 3(b)(2) exemption when supplying workers solely for his own operation.

Since the first example is superfluous, Regulation 41.17 does not state that title to crops at the time of harvest is determinative of the Section 3(b)(2) issue for packing shed operators. (Rather it merely indicates that if a packing shed operator were to acquire title to the crops prior to harvesting them he would be acting as a farmer and therefore exempt under the 3(b)(2) farmer exemption.) To the extent that Regulation 41.17 could possibly be interpreted to state that title to the crops at the time of harvest is determinative, said interpretation was subsequently explicitedly *disapproved* by Congress:

> "The Committee wishes to clarify the phrase 'solely for his own operation' as used in section 3(b)(2) of the Act. The Committee intends that the application of this provision *shall not necessarily depend on where title to the commodities involved rests at the time [of harvest], but shall in the future depend on a full consideration of the economic realities of agricultural production and processing.*" (Emphasis added). (Senate Report No. 93-1295, 1974 *U.S. Code Cong. & Admin. News* 6441, at 6447).

Congress further indicated that title to the crops at the time of harvest is not determinative when, after the

Secretary of Labor promulgated Regulation 41.17, Congress indicated that it was its intention to include within the 3(b)(2) exemption for farmers any person who is a farmer within the meaning of Section 3(f) of the Fair Labor Standards Act, *including grove care contractors* who perform all of the farming operations for fruit grove owners *but never acquire title* to the crop.

> "It is also the intention of the Committee to include within the personal exemption for agricultural operators (§ 3(b)(2) of the Act) any person who is a farmer within the meaning of Section 3(f) of the Fair Labor Standards Act. Thus, for example, grove care contractors who perform all of the farming operations for fruit grove owners required prior to harvest in producing a crop of fruit from the owners groves have been considered "farmers" within the meaning of the Fair Labor Standards Act (opinion of the Administrator on advice of the Solicitor of Labor, April 18, 1970, BNA-WHM 91:858r) and would not be deemed farm labor contractors by virtue of any personal engagement by them in activities solely for performance of their own farming operations in the groves of the owners with whom they have contracted." Senate Report No. 93-1295, 1974 *U.S. Code Cong. & Admin. News* 6441, at 6447.

It is therefore obviously Congress' intent that this Honorable Court shall not consider title to the crops at the time of harvest as determinative of the Section 3(b)(2) exemption. Instead, Congress wishes this Honorable Court to make a determination in "full consideration of the economic realities of agricultural production and processing." [Senate Report No. 93-1295, 1974 *U.S. Code Cong. &*

Admin. News 6441, at 6447.] As stated within *Usery v. Paramount Citrus Ass'n, Inc.*, 475 F. Supp. 700 at 705 (1979):

> "These 'economic realities of agricultural production and processing' include a wide range of circumstances, among them considerations of economy of operations, competitive influences, financial risks, in the prevalent practices in a given agricultural community. No one of these considerations should be determinative in itself, but they are guide posts to be used in determining whether a given operator's hiring of migrant workers is done for his own operation or as a middleman."

The economic realities in the instant situation indicate that Silver Creek only harvests those melon crops that it has contracted to pack and sell. Silver Creek exerts substantive control over the planting and care of those crops which it has contracted to pack and sell. And Silver Creek completely controls the harvesting process itself. Silver Creek supervises and controls the entire harvesting, hauling, packing, selling and shipping operation. Silver Creek's farmer-clients exercise no control and have no right to control any of these operations. Therefore, the conclusion is inescapable that Silver Creek is a vertically integrated business, whose harvesting activities are "solely" for its own operation. Silver Creek is, therefore, entitled to the Section 3(b)(2) exemption from registration.

B. If This Honorable Court Does Not Reject The Title To Crop Test, The Application Of That Test To The Section 3(b)(2) Exemption Will Lead To Absurd Results For The Members Of The Nisei Farmers League

If the Ninth Circuit Court of Appeals ruling that the title to the crop at the time of harvest is determinative is not overruled by this Honorable Supreme Court, then numerous farmer members of the Nisei Farmers League may be required to register. These farmers commonly sell their crops to a processor prior to harvest and subsequently (for an additional fee) harvest and deliver that crop to the processor. Since the farmer in this situation is harvesting a crop which he grew but no longer retains title, the Secretary of Labor (as supported by the Ninth Circuit Court of Appeals' decision herein) may contend that the 3(b)(2) exemption from registration is not available. Such a result would be absurd since the Congressional history clearly indicates Congress' intent is not to require farmers to register.

Also, the Ninth Circuit Court of Appeals utilization of the title to crop at time of harvest test for determining when a packing shed operator is entitled to the 3(b)(2) exemption does not recognize the realities of the California agricultural community. Many of the Nisei Farmer League members who are packing shed operators sometimes acquire title to a client-farmer's crop prior to harvest. But on those occasions, the amount of payment for having so acquired title is often determined by the amount of tonnage subsequently harvested. In other words, the Ninth Circuit Court of Appeals should not have assumed that

merely because a packing shed operator acquires title to a crop prior to harvest that therefore the farmer-grower is no longer interested in the amount of crop subsequently harvested by the packing shed operator.

Further, the Ninth Circuit Court of Appeal's utilization of the "title to crop" test will sometimes require farmers and their packing shed operators to simultaneously both register. For example, packing shed operator members of the Nisei Farmers League sometimes buy fruit prior to harvest from farmer members of the Nisei Farmers League. The packing shed operator in the height of the harvest season, even after he has paid cash to acquire title to the crop, will sometimes ask the grower to pick and haul the crop (for an additional fee) to the packing shed. The grower often agrees to perform that additional responsibility but will ask the packing shed to send him harvest workers. The packing shed operator (who at the height of the harvest season is short of supervisors and picking and hauling equipment but has enough field laborers) will deliver those field laborers to the grower. Then the grower will, for a fee, supervise the harvesting and delivery operation with his own equipment. Under this situation, the Department of Labor may use the Ninth Circuit Court of Appeals decision to require both the grower and the packing shed operator to register by denying both of them the 3(b)(2) exclusion. Such would, of course, be contrary to Congressional intent.

III

CONCLUSION

It is therefore respectfully submitted that this Honorable Court should reverse the Ninth Circuit Court of Appeals' decision and instead rule that Silver Creek is entitled to a Section 3(b)(2) exemption. The economic realities of agricultural production and processing indicate that the hiring of harvesting workers by a packing shed operator (who only harvests the fruit of client-farmers who have agreed to allow said packing shed operator to pack and sell the fruit) is done for harvesting that is part of the packing shed operator's own operation; and is not done for harvesting by the grower using the packing shed operator as a middleman to supply workers.

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